USALSA Report

United States Army Legal Services

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the second quarter of Fiscal Year 1997 (FY97) are shown below. For comparison, the previous quarter and Fiscal Year 1996 (FY96) processing times are also shown below.

General Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97
Records received by Clerk of Court	793	169	192
Days from charges or restraint to sentence	62	66	63
Days from sentence to action	86	86	94
Days from action to dispatch	9	7	11
Days en route to Clerk of Court	9	11	9

BCD Special Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97
Records received by Clerk of Court	167	42	35
Days from charges or restraint to sentence	45	56	38
Days from sentence to action	85	83	82
Days from action to dispatch	6	5	15
Days en route to Clerk of Court	8	11	8

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial rates for the first and second quarters of fiscal year 1997 are shown below.

Rates per Thousand

First Quarter Fiscal Year 1997; October-December 1996

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.35 (1.38)	0.37 (1.47)	0.50 (2.02)	0.13 (0.53)	0.38 (1.52)
BCDSPCM	0.12 (0.49)	0.12 (0.49)	0.14 (0.58)	0.15 (0.62)	0.38 (1.52)
SPCM	0.01 (0.04)	0.01 (0.04)	0.02 (0.07)	0.00 (0.00)	0.00 (0.00)
SCM	0.13 (0.53)	0.16 (0.62)	0.09 (0.36)	0.07 (0.26)	0.00 (0.00)
NJP	17.81 (71.22)	20.02 (80.09)	14.76 (59.04)	11.50 (46.01)	27.75 (111.01)

Note: Based on average strength of 485,283.

Figures in parenthesis are the annualized rates per thousand.

Rates per Thousand

Second Quarter Fiscal Year 1997; January-March 1997

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.36 (1.46)	0.36 (1.44)	0.59 (2.37)	0.26 (1.04)	0.78 (3.10)
BCDSPCM	0.16 (0.65)	0.14 (0.56)	0.32 (1.29)	0.22 (0.87)	0.00 (0.00)
SPCM	0.00 (0.01)	0.00 (0.01)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.22 (0.90)	0.29 (1.17)	0.04 (0.14)	0.00 (0.00)	0.78 (3.10)
NJP	20.71 (82.85)	22.26 (89.06)	15.92 (63.66)	23.49 (93.97)	29.45 (117.81)

Note: Based on average strength of 481,065.

Figures in parenthesis are the annualized rates per thousand.

Litigation Division Note

Interrogatories—to Answer or not to Answer, That is the Question: a Practical Guide to Federal Rule of Civil Procedure 33

Introduction

In theory, there could not be a simpler, more efficient, and less expensive discovery method than sending written questions to the opposing party and having him send back the sworn written answers. In practice, however, interrogatories often are frustrating, costly, and ineffective for both parties. Interrogatories serve two primary functions: identifying the sources of available evidence (e.g., witnesses and documents) and narrowing disputed issues of fact. Historically, however, practitioners have used interrogatories as a litigation tactic to harass and to overwhelm an opponent or to delay the resolution of a dispute.[1] In an attempt to curb the misuse of interrogatories in federal practice, the discovery rules of the Federal Rules of Civil Procedure (Rules) have been refined to ensure that interrogatories serve their intended purposes.[2]

In federal litigation, Rule 33 governs the propounding and answering of interrogatories. The rule generally provides for written questions of one party to be answered under oath by another party. As part of the discovery scheme of the Rules, Rule 33 incorporates the general discovery provisions of Rule 26 (scope of inquiry), Rule 29 (time limits to respond), and Rule 37 (sanctions for failing to appropriately respond). To reduce the frequency, and to increase the efficiency, of interrogatory practice, Rule 33 has been revised numerous times.[3] The most recent revisions limit the number of interrogatories that a party may propound[4] and emphasize the responding party's duty to provide complete answers.[5] While debate remains about whether these revisions are improving the discovery process, attorneys practicing federal litigation need to understand Rule 33 to effectively use interrogatories. This article provides an overview of Rule 33 and a practical guide to propounding, answering, and objecting to interrogatories.

Propounding Interrogatories

Experienced litigation attorneys know the benefits of timely and properly propounded interrogatories. Without great expense in time or money, interrogatories narrow the issues and reveal vital evidence in a case. When employed early,[6] they allow a party to focus discovery resources on relevant issues and impose an obligation on an opposing party to supplement its answers throughout the course of litigation.[7] The responsibility for propounding interrogatories rests primarily with the trial attorneys,[8] but the field attorney[9] who drafted the litigation report may have the best insight into the right questions to ask an opposing party. A thorough litigation report should include draft interrogatories or at least identify potential questions to be asked of an opposing party.

When drafting interrogatories, attorneys must know what information is sought and for what purpose it will be used. The attorney should target the interrogatories at discrete issues, rather than employ a shotgun approach.[10] The questions should be direct, unambiguous, and nonargumentative to avoid drawing objections or nonresponsive answers. For example, if receipt of notice about an event is at issue in a case, an interrogatory asking whether the opponent "received notice" of the event will invite an objection or an evasive answer. A better interrogatory would ask what written and oral communications the opponent received about the event, leaving the conclusion regarding notice to be drawn at trial.[11] Avoid the temptation to use boilerplate interrogatories. They are of little benefit and usually insult the court.[12] Similarly, the use of lengthy defini-

1. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

2. *See* FED. R. CIV. P. 26 (General Provisions Governing Discovery; Duty of Disclosure); FED. R. CIV. P. 33 (Interrogatories to Parties); FED. R. CIV. P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes); and FED. R. CIV. P. 37 (Failure to Make Disclosure or Cooperate in Discovery: Sanctions).

3. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

4. FED. R. CIV. P. 33(a).

5. *See* FED. R. CIV. P. 33 advisory comm. notes (1993) (regarding Subdivision (b)).

6. FED. R. CIV. P. 33(a) (purposely limiting the speed with which interrogatories can be served on the opposing party) "Without leave from the court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d)." *Id*. The intent of the discovery rules is to allow parties to meet and to discuss their claims and defenses and to promote early resolution of an action before extensive discovery begins.

7. FED. R. CIV. P. 26(e).

8. The trial attorneys include the Army's Litigation Division attorneys, Assistant United States Attorneys, and Department of Justice attorneys who may actively participate in the trial.

9. The field attorneys are the local command attorney advisors, such as claims attorneys, labor counselors, and administrative law attorneys.

10. WILLIAM W. SCHWARZER ET AL., CIVIL DISCOVERY AND MANDATORY DISCLOSURE § 4-5 (2d ed. 1994).

tions and instructions preceding interrogatories become "counter productive when the definitions become so complex that they are ignored."[13] Rather than draft all-encompassing definitions, use simple language with plain meaning that cannot be evaded. The discovery rules themselves contain adequate definitions that can be incorporated by reference to guide the respondent in answering the questions.[14] Global definitions tend to be ineffective and invite objections that render the entire set of interrogatories useless.

Limits & Scope

Over the entire course of litigating a case, Rule 33 limits a party to twenty-five interrogatories.[15] While each question can have related subparts,[16] asking more than twenty-five interrogatories requires either a written stipulation from the opposing party or court approval.[17] The reason for the limit on the number of interrogatories is twofold. First, much of the information previously obtained through interrogatories, such as the names of witnesses, descriptions of documents, damage computations, and insurance coverage, is now part of mandatory preliminary disclosure.[18] Second, the limit prevents a party from inundating the opposing party with excessive interrogatories.[19] The rule's aim is not to limit necessary discovery, but to provide judicial scrutiny before parties make excessive use of this discovery device.[20]

The revisions to the Rules broaden the scope of proper interrogatories. Underlying these revisions is the philosophy that parties to civil actions are entitled to disclosure of all relevant facts that are not specifically privileged.[21] The days of surprise witnesses are gone, and interrogatories *can* be a "fishing expedition."[22] Today, the Rules allow inquiry into any matter, not privileged, which is relevant to the subject matter of the pending action, so long as it appears reasonably calculated to lead to the discovery of admissible evidence.[23] Even inquiry into the opinions and contentions of an opposing party that relate to facts or the application of law to facts are allowed by the Rules.[24] These inquiries, called "contention interrogatories," are appropriate if used sparingly and with factual specificity. They can be invaluable in narrowing the issues, laying foundations for motions, and preparing a thorough trial defense.

While blanket inquiries will likely draw objections, focused inquires regarding specific contentions will require responses. It is appropriate to inquire about specific issues, such as whether the opponent relies on a negligence liability theory and the factual basis of that theory. However, asking a party to state *all* theories of liability and *every* fact supporting those theories is objectionable. Similarly, it is improper to attempt to use contention interrogatories as a substitute for one's own work (for example, asking an opposing party to state potential defenses and the factual problems anticipated with each). Contention interrogatories are best employed later in the litigation process, when the party can be expected to have the information necessary to respond.

The final step in propounding interrogatories is to ensure compliance with the local rules of court. Each jurisdiction has modified the federal discovery rules, some allowing more interrogatories, some less. Local rules may also require a particular format, or may modify the timing of interrogatories.[25] When in doubt as to whether the local rules modify Rule 33, consult the trial attorney in the district or the Army Litigation Division attorney assigned to the case.

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11. *Id.*

12. G. Ross Anderson, *Discovery Sanctions*, 6 S.C. LAW. 14 (1995).

13. SCHWARZER ET AL., *supra* note 10, § 4-6.

14. FED. R. CIV. P. 34(a).

15. FED. R. CIV. P. 33(a).

16. *See* FED. R. CIV. P. 33 (The advisory committee notes for the 1993 amendments state, "Parties cannot evade this presumptive [25 question] limitation through the device of joining as 'subparts' questions that seek information about discrete separate subjects.").

17. FED. R. CIV. P. 33(a).

18. FED. R. CIV. P. 26(a)(1).

19. *See* FED. R. CIV. P. 33 advisory comm. notes (1993).

20. *Id.*

21. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 81 (4th ed. 1983).

22. *Id.* § 82.

23. FED. R. CIV. P. 33(c) (incorporating FED. R. CIV. P. 26(b)(1)). *See also,* Dart Indus., Inc. v. Liquid Nitrogen Processing Corp., 50 F.R.D. 286, 292 (D. Del. 1970).

24. *Id.*

Answering Interrogatories

Interrogatories served on the United States can be answered by any officer or agent who can furnish the requested information.[26] Typically, the person answering the interrogatories is the field attorney who prepared the litigation report (for example, a claims attorney in tort cases or a labor counselor in Title VII cases). Historically, the burden of answering interrogatories in Army litigation rarely fell on the trial attorney, but rather, on the local command and its advising attorneys. For that reason, field attorneys must be aware of the federal interrogatory rules. Rule 33 requires the person making the answers to sign them, attesting to their truthfulness; it also requires the trial attorney to sign the objections.[27] Having the field attorney verify and sign for the responses is appropriate for two reasons. First, the field attorney often has either personal knowledge to formulate the answers or the best resources to gather the information needed to answer the interrogatories. Second, it prevents the trial attorney from becoming a potential witness in the trial, which would disqualify him from representing the United States.

As a general rule, answering interrogatories requires a responding party to furnish all information available to him.[28] Consequently, the responding party must make a reasonable search of his records and a reasonable inquiry of his personnel to respond to interrogatories.[29] Attorneys must decide on a case-by-case basis the extent to which a responding party must conduct research to answer an interrogatory. As a rule, if the responding party would gather the information in preparation of its own case, the research must be done.[30] If an interrogatory seeks information which is not in a responding party's possession, custody, or control, the responding party generally need not do independent research to respond.[31] While the Rules preclude discovery of matters subject to a privilege or "attorney work product" protection, they still require disclosure of a description of the information claimed to be protected.[32] The fact that a requester already possesses requested information or that information is a public record does not relieve a party of the requirement to answer the interrogatory.[33]

When the answer to an interrogatory must be derived from records of the responding party, Rule 33 provides the responding party the option to make the records available to the requesting party, rather than ascertaining the answer itself.[34] This method of response can only be used when the burden of compiling or extracting an answer from the records would be the same for both parties; also, the task must be beyond mere reference to the records.[35] Additionally, the records must be in sufficient order and specifically identified so that the requesting party can ascertain the requested answers as easily as the responding party could.[36]

The simple goal of Rule 33 is to ensure that a party answers the relevant questions of an opposing party. That is not to say that a party must divulge all information in his possession to the opposing party. Answers to interrogatories should be responsive, accurate, and complete, but they should be made with the understanding that they will be used against the responding party. Consequently, interrogatories should be approached with a defensive frame of mind. Words should be chosen carefully, with an eye toward their use at trial.

Interrogatories require answers within thirty days of service.[37] This time limit can be extended or shortened as the parties agree or by order of the court.[38] In addition, local rules may

25. For example, Local Rule 8.2.2 of the District Court for the Central District of California requires that interrogatories be numbered consecutively throughout the sets of interrogatories propounded.

26. FED. R. CIV. P. 33(a).

27. FED. R. CIV. P. 33(b)(2).

28. FED. R. CIV. P. 33(a).

29. *See* FED. R. CIV. P. 26(g)(1). The advisory committee note provides that a "reasonable inquiry" is ultimately based on the totality of the circumstances. *Id*.

30. 2 JOHN M. CARROLL ET AL., FEDERAL LITIGATION GUIDE § 12.01 (1996), *citing* Gerling Int'l Ins. Co. v. Commissioner, 839 F.2d 131 (3rd Cir. 1988). *See also,* American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680 (D.R.I. 1959).

31. La Chemise LaCoste v. Alligator Co., 60 F.R.D. 164, 171 (D. Del. 1973); United States v. Columbia Steel Co., 7 F.R.D. 183, 184 (D. Del. 1947).

32. FED. R. CIV. P. 26(b)(5) (providing that a claim of privilege must be expressly made and "shall describe the nature of the documents, communication, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the applicability of the privilege or protection").

33. Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958).

34. FED. R. CIV. P. 33(d).

35. T.N. Taube Corp. v. Marine Midland Mortgage Corp., 136 F.R.D. 449 (W.D.N.C. 1991).

36. Herdlein Tech., Inc. v. Century Contractors, Inc., 147 F.R.D. 103 (W.D.N.C. 1993).

37. FED. R. CIV. P. 33(b)(3).

impose different limits on when responses to interrogatories are due. Generally, a response may not be delayed indefinitely until a complete answer is available.[39] Unlike the general rule, however, the court may order that answers to contention interrogatories be delayed until discovery is completed or a pre-trial conference is held.[40] Failing to timely answer may subject a party to a motion to compel and sanctions.[41] Therefore, it is vital that interrogatories receive prompt attention.

The process of answering interrogatories requires a coordinated effort between the trial attorney (usually an Assistant United States Attorney (AUSA)), an attorney from the Litigation Division, and the field attorney designated to answer the questions. In a typical case, the AUSA receives a set of interrogatories from the plaintiff's counsel and forwards them to the Army's litigation attorney. After review, the interrogatories are forwarded to the appropriate field attorney for preparation of the draft answers. Prior to completion, the draft answers are reviewed by the Litigation Division attorney. Upon approval of the answers, the field attorney signs the verification or Jurat, attesting to the truthfulness of the answers. The signed answers are sent to the AUSA, who must sign for any objections raised and certify compliance with the discovery rules.[42]

Objections

An interrogatory must be fully answered unless objected to, "in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."[43] Any ground for objection which is not stated in a timely manner is waived. [44] In some jurisdictions, objections must be made and filed with the court *prior* to the expiration of the thirty days established under Rule 33. If an objection is based on a privilege or attorney work product doctrine, it must be expressly stated with sufficient detail to allow the other party to assess the applicability of the privilege or doctrine.[45]

The litigation attorneys are primarily responsibility for raising objections to interrogatories, but often the field attorney is in the best position to know when a request is objectionable. For example, a medical claims judge advocate may recognize that a certain interrogatory seeks disclosure of protected medical information. In that case, the medical claims attorney must raise this objection to the litigation attorneys, who may be unaware of the protected nature of the information.

There are many possible grounds for objecting to interrogatories. Sample objections are provided below. These samples are not intended to serve as boilerplate objections to be asserted in every case. Rather, they should assist in identifying valid objections to be asserted when appropriate.

Sample General Objections

In providing these responses to the discovery request, the Government reserves the right to supplement, clarify, revise, or correct any or all of the responses herein at any time.

In providing these responses to the discovery request, the Government does not in any manner admit or imply that it considers any of the interrogatories or responses thereto, or any documents produced pursuant to the discovery request, to be relevant or material to the subject matter of this action or to the claims or defenses of any party herein or that such discovery request or documents are reasonably calculated to lead to the discovery of admissible evidence.

The Government does not waive, and hereby reserves its right to assert, any and all objections to the admissibility into evidence at the trial of this action, or in any other proceeding, of any response to the discovery request or any document produced or referred to in response to the discovery request, on any and all grounds, including, but not limited to, competency, relevance, materiality, and privilege. The Government does not waive any objection that it might have to any other discovery request involving or relating to the subject matter of the discovery request.

The factual information sought by the discovery request is not within the personal knowledge of any one employee or several employees of defendant. Information necessary to answer those interrogatories seeking factual information was provided by a review of available records, responses to discovery, and information gathered collectively from persons having personal knowledge of the matters discussed.

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38. *Id.*

39. Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

40. FED. R. CIV. P. 33(c).

41. *See* FED. R. CIV. P. 37 (allowing the moving party to receive reasonable expenses, including attorney's fees from the noncompliant party).

42. FED. R. CIV. P. 33(b)(2), 26(g).

43. FED. R. CIV. P. 33(b)(1).

44. FED. R. CIV. P. 33(b)(4).

45. FED. R. CIV. P. 26(b)(5).

These responses to the discovery request are accurate to the best of the Government's knowledge as of this date. The Government's investigation, however, is continuing, and the Government may obtain additional information relevant to the subject matter of this action through discovery and further review of documents which plaintiff may produce in this action. The Government reserves the right to rely in this action on subsequently discovered information.

The Government reserves the right to object to the use of its responses to the interrogatories in any proceeding other than the above-captioned action.

Sample Specific Objections[46]

The United States objects to Interrogatory/Request No. ___ to the extent that it seeks the date of birth, home address, and social security number of _____ on the ground that any disclosure would be in violation of the Privacy Act, 5 U.S.C. § 552a.

The United States objects to Interrogatory/Request No. ___ on the basis that such information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

The United States objects to Interrogatory/Request No. ___ to the extent that it seeks information protected by the attorney-client privilege and the work product doctrine.

The Government objects to Interrogatory/Request No. ____ on the grounds that it is vague and ambiguous. Specifically, _____.

The United States objects to Interrogatory/Request No. ____ on the grounds that it seeks information beyond the scope of Local Civil Rule ____.

The United States objects to Interrogatory/Request No. ___ on the ground that it is overly broad. Specifically, _____.

The United States objects to Interrogatory/Request No. ___ on the grounds that it seeks analysis, recommendations, findings, and conclusions from the safety investigation conducted by the United States Army Safety Center that is protected under the deliberative process privilege. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963).

The United States objects to Interrogatory/Request No. ___ on the grounds that it seeks Quality Assurance documents protected from disclosure pursuant to 10 U.S.C. § 1102.

The United States has not yet determined which (witnesses)(expert witnesses)(exhibits) will be used at trial. At the appropriate time, and in compliance with the court's scheduling order, the government will designate its _____ and provide a supplemental response to this Interrogatory.

Sample Jurat

Based upon the information available to me, the substantive answers given in response to Interrogatories __ through __, with respect to the factual contentions of the defendant in this lawsuit, are true and correct. After a reasonably diligent search of our files in the appropriate offices, the documents produced in response to Request for Production Numbers __ through ___ are all those known to be within the possession, custody, or control of the Department of the Army that are responsive and are not otherwise objectionable, objected to, or privileged. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ___ day of _____. Signed _____.

Conclusion

Interrogatories should be interpreted and answered so as to promote, rather than impede, the fair exchange of information.[47] However, attorneys must be ever mindful that the answers to interrogatories are sworn testimony and may significantly impact the later defense of a case. Employed properly, interrogatories are an effective discovery device. Misused, they frustrate the discovery process, delay resolution of cases, and subject parties to sanctions. Questions regarding proper use of Rule 33 should be directed to the Litigation Division. Major Bradley.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS) and on the ELD website (http://160.147.194.12/eld/eldlink2.htm). The *Bulletin*, volume 4, number 9, is reproduced below.

EPA Issues Final Rule on Land Disposal Restrictions (LDR) Phase IV and Issues Supplemental Proposed Rule

46. Any objection should normally be followed with: "Without waiving said objection, the United States responds that . . . ."

47. SCHWARZER ET AL., *supra* note 10, § 4-6 (2d ed. 1994).

On 12 May 1997, the EPA finalized portions of the Land Disposal Restrictions (LDR) Phase IV rule.[48] The final rule reduces reporting and record-keeping, finalizes treatment standards for wood-preserving wastes, and clarifies the exception for de minimis amounts of characteristic wastewater from LDR requirements. The rule also changes the definition of solid waste to exclude from Resource Conservation and Recovery Act (RCRA) regulation all processed scrap metal and shredded circuit boards that are being recycled. The recently issued rules are the most recent portion of the LDR program, which was mandated by the 1984 Hazardous and Solid Waste Amendments (HSWA) of the RCRA.[49] The HSWA prohibits land disposal of hazardous waste unless the waste meets the EPA's established treatment standards. Phase IV is the latest in a series of LDR rules which establish treatment standards for newly identified and listed wastes. The Army Environmental Center is currently writing an Army impact analysis on the final rule.

The EPA also issued a supplemental proposed rule that revises LDR treatment standards for mineral processing wastes, certain metal wastes, and metal constituents that are hazardous wastes.[50] The proposed rule revises the "mixture rule" exemption for mineral processing wastes and revises the universal treatment standards for twelve metal constituents. The supplemental proposal clarifies the EPA policies on variances from hazardous waste treatment which are granted by the EPA and on the acceptable use of hazardous waste as fill material.

The ELD and the Army Environmental Center will be reviewing the supplemental proposed rule and will draft the DOD comments, to be submitted to the EPA by 12 August 1997. Judge advocates are encouraged to read the proposed rule and submit any comments as soon as possible, but not later than 21 July 1997. Please mail comments to Bob Shakeshaft at the following address: Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401. Comments can also be faxed (DSN 584-1675 or (410) 612-1675) or sent via e-mail (rashakes@aec.apgea.army.mil). Major Anderson-Lloyd.

Endangered Species Act—Legislation and Litigation Update

Legislative proposals and court decisions indicate that the Endangered Species Act (ESA),[51] as it applies to Federal agencies, remains viable and soon may be stronger. Currently, Congress is contemplating a "discussion draft" of a bill to reform the ESA.[52] While the draft bill is geared primarily toward relieving what have been viewed as past hardships upon private interests, the consequence may be to increase the responsibilities of federal land managers. Meanwhile, litigation over numerous aspects of implementation of the ESA continue to prove that the ESA can indeed be the pit bull of environmental laws.[53]

Plaintiffs continue to press the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service to speed up listing actions and to designate critical habitat for listed species. In one recent case, the plaintiffs and the Department of Interior (DOI) agreed to a settlement and a joint stipulation to set specific deadlines for listing decisions on over eighty species.[54] The DOI agreed to publish either a proposed rule for listing a species as threatened or endangered or a determination that the species no longer warranted listing according to the following schedule: determinations made for forty-one identified candidate species by 1 April 1998 and determinations made for another forty-three species by 31 December 1998.

In addition to facing litigation over not listing species quickly enough, the DOI also faces several cases in which the plaintiffs are questioning the DOI's decision not to identify critical habitat.[55] The United States Court of Appeals for the Ninth Circuit recently strengthened this avenue of attack by scrutinizing a specific designation decision made by the USFWS.[56] The case involved a USFWS decision not to designate critical hab-

48. *See* Land Disposal Restrictions-Phase IV: Treatment Standards for Wood-Preserving Wastes, Paperwork Reduction and Streamlining, Exemptions From RCRA for Certain Processed Materials, and Miscellaneous Hazardous Waste Provisions, 62 Fed. Reg. 25,998 (1997) (to be codified at 40 C.F.R. pts. 148, 261, 268, and 271).

49. Pub. L. No. 98-616, 98 Stat. 3221 (1988) (codified as amended at 42 U.S.C. §§ 6901-92).

50. *See* Land Disposal Restrictions Phase IV: Second Supplemental Proposal on Treatment Standards for Metal Wastes and Mineral Processing Wastes, Mineral Processing and Bevill Exclusion Issues, and the Use of Hazardous Waste as Fill, 62 Fed. Reg. 26,041 (1997) (to be codified at 40 C.F. R. pts. 148, 261, 266, 268, and 271).

51. The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1996).

52. *Kemmpthorne, Chafee Circulate Species Draft While Young Seeks Administration Proposal*, ENVIRONMENTAL AND ENERGY WEEKLY BULLETIN (Environmental and Energy Study Conference, Wash., D.C.), Feb. 21, 1997, at 1 ("Senators Kempthorne and Chafee are circulating a 'discussion draft' of legislation to comprehensively reform the ESA."). A copy of the discussion draft is on file with the author at the ELD. The ELD assisted the Department of Defense in preparing comments to the discussion draft; the comments were submitted on 21 March 1997.

53. David D. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?*, 143 MIL. L. REV. 161, 174 (1994) (citing Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991)).

54. The Fund for Animals Inc. v. Babbitt, No. 92-0800, 1997 WL 355239 (D.D.C. Jan. 30, 1997) *as reported in* WILDLIFE L. NEWS Q., Spring 1997, at 11.

itat for a listed, threatened bird (the California gnatcatcher). The court found the USFWS decision arbitrary and capricious, even though the USFWS decision had been previously upheld by the United States District Court for the Middle District of California. In yet another listing case, the Court of Appeals for the Ninth Circuit held that the Secretary of Interior must publish the final regulation regarding a listed species within one year after the proposed notice is published.[57]

The ESA also recently withstood a constitutional attack, when land developers argued that Congress only has the power to regulate interstate commerce and that the "takings" provision of the ESA was unconstitutional if applied to a solely intrastate species. A coalition of land developers alleged that a California fly that lives only in a localized area of California could not affect interstate commerce.[58] The court found, however, that the Delhi Sand Flower-Loving Fly (a federally-listed species), and other wildlife that live within one state's borders, could be a part of the stream of interstate commerce and could have an effect on interstate commerce. Therefore, the Court found that the Delhi Sand Flower-Loving Fly was subject to Congressional power to regulate interstate commerce, despite the fact that the species lives only in California. Major Ayres.

Fifth Circuit Determines a Release Above Background Levels Does Not Trigger the Need for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Response

In *Licciardi v. Murphy Oil USA, Inc.*,[59] the United States Court of Appeals for the Fifth Circuit held that whether a defendant is liable for Superfund response costs depends on whether the hazardous substance released justifies incurring cleanup costs. The allegations involved the migration from Murphy Oil of lead contamination in excess of background levels. The Fifth Circuit reversed a district court finding of liability based on exceeding the background level for lead as established by U.S. Geological Survey data. The Court of Appeals found that this is not a regulatory standard, that the background level was based on measurements some thirty miles from the site, and that the Toxic Concentration Leaching Procedure was below regulatory standards.[60]

The *Licciardi* ruling expanded the Fifth Circuit's 1989 ruling in *Amoco Oil Co. v. Borden, Inc.*,[61] which held that a plaintiff who is seeking to recover response costs must prove that the release violates, or the threatened release is likely to violate, an applicable state or federal regulatory standard. Simply proving the release of a CERCLA hazardous substance in any quantity is not sufficient. Lawyers for Murphy Oil said that the appeals court's focus on whether a release posed a threat to the public or the environment was consistent with the purpose of CERLA. Plaintiff's counsel said they will file a certiorari petition with the United States Supreme Court. Lieutenant Colonel Lewis.

Tenth Circuit Denies Attempt To Regulate Tooele Stack Emissions Under CWA

On 22 April 1997, the United States Court of Appeals for the Tenth Circuit denied an attempt by advocacy groups to force regulation of the stack emissions from the Army's Tooele Chemical Agent Disposal Facility (TOCDF).[62] The groups, which are opposed to the incineration of chemical weapons, sought regulation of the TOCDF under the Clean Water Act (CWA). The Army has a Clean Air Act permit for the facility's incinerator stack emissions, but the plaintiffs alleged that the CWA, which places an absolute ban on the discharge of any chemical warfare agent into navigable waters, applied to the stack emissions.

The TOCDF's Clean Air Act permit specifically authorizes limited amounts of chemical warfare agent particles to be discharged into the atmosphere as part of the incinerator's emissions. The plaintiffs argued that § 301(f) of the Clean Water Act[63] absolutely and unambiguously prohibited the discharge of chemical warfare agents from the TOCDF's stack emissions that could eventually be deposited by atmospheric deposition into navigable waters. The plaintiffs further contended that the text of the provision placed no limitation on the form of chemical agent discharged or on the manner by which it enters navi-

55. In a case of immediate concern to the Army, the plaintiffs want the Department of Interior to designate critical habitat for 278 plant species in Hawaii, some of which exist only on military installations. Conservation Council for Hawaii v. Babbitt, No. 97-00098 (D. Haw. filed May 21, 1997).

56. Natural Resources Defense Council v. United States Dep't of Interior, 113 F.3d 1121 (9th Cir. 1997).

57. Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334 (9th Cir. 1996).

58. National Ass'n of Home Builders v. Babbitt, 949 F. Supp. 1 (D.D.C. 1996).

59. 111 F.3d 396 (5th Cir. 1997).

60. *Id.*

61. 889 F.2d 664 (5th Cir. 1989).

62. Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485 (10th Cir. 1997).

63. 33 U.S.C. § 1311(f) (1994).

gable waters. Absent such limitations, the plaintiffs urged the court to read § 301(f) broadly, to include discharge by way of atmospheric deposition, to comply with the Congressional intent of the CWA.

The Utah district court had rejected the plaintiffs' broad reading of the CWA to include the stack emissions of the facility and found that such a reading would lead to an irreconcilable conflict with the provisions of the Clean Air Act permit. Consequently, the district court dismissed the case for failure to state a claim.[64]

In affirming the district court's dismissal of the Clean Water Act allegation, the Tenth Circuit also declined to construe the Clean Water Act as broadly as plaintiffs proposed. The court held that the plaintiffs' proposed reading of the CWA "would lead to irrational results . . . [and] would create a regulatory conflict between the Clean Water Act and the Clean Air Act."[65] The argument that atmospheric deposition of the emissions from even cars and chimneys that could find their way to navigable waters could be regulated by the EPA under a nationwide permit was rejected by the Tenth Circuit as "exposing the absurdity of [the] position."[66] The court held that although the plaintiffs "may be correct in arguing that an object may fly through the air and still be "discharged . . . into the navigable waters" under the Clean Water Act, common sense dictated that the TOCDF's stack emissions constitute discharges into the air, not water, and are therefore beyond the reach of §301(f).[67] Major Mulligan.

Environmental Compliance Assessment System (ECAS) Program Information Notebook Update

The ECAS Program Information Notebook (PIN), which is under revision, is a compendium of guidance documents for the Army's in-house environmental inspection system. The portion of the PIN dealing with legal issues has been consolidated into one memorandum from the ELD.[68] The ELD's guidance is that ECAS documents are working documents until completion of the final Environmental Compliance Assessment Report; therefore ECAS documents are not to be released under the Freedom of Information Act (FOIA). The ELD has further advised commanders of the importance of ensuring that all environmental problems which are identified are promptly addressed, through either correction or appropriate funding requests. For Army lawyers at installations being assessed under the ECAS, the ELD emphasizes the importance of active attorney involvement, including advising on reporting requirements, FOIA issues, and funding priorities. Mr. Nixon.

Environmental Compliance Compendium

Environmental Compliance in Virginia, published by Business & Legal Reports, Inc. (BLR) is an easy-to-use service covering federal and state environmental regulations. To review the volumes that cover a state's regulations, contact BLR at 39 Academy Street, Madison, Connecticut 06443-1513. Similar services are available from the Bureau of National Affairs, Inc. and other publishers of environmental compliance information. The same information is also available in the Environmental Compliance Assessment System Protocol Manual that may be ordered from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

64. Chemical Weapons Working Group Inc. v. United States Dep't of the Army, 935 F. Supp. 1206 (D. Utah 1996).

65. *Chemical Weapons Working Group*, 111 F.3d at 1490.

66. *Id.*

67. *Id.*

68. The ELD memorandum is located in the ELD Online Information area of the ELD Environmental Law Links website (http://160.147.194.12/eld/eldlink2.htm), as well as in the Environmental Files area of the LAAWS BBS.